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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 71-14

R. O. CRAIG, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to Court of Appeal of the State of California
in and for the Third Appellate District

HARRY A. ACKLEY,
823 North Street,
Woodland, California 95695,
Attorney for Petitioner.

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Subject Index

Page

Reference to the opinions and rulings of the courts below... 1

Statement of the grounds upon which jurisdiction of the United States Supreme Court is invoked 4

The questions presented for review 5

The constitutional provisions of the United States Constitution which the case involves 6

The California Statute which the case involves 7

Statement of the case 7

Argument and authority 12

(1) California Penal Code Section 1016 which provides that a defendant who pleads only "not guilty by reason of insanity" thereby admits the commission of the offense charged is unconstitutional in that it comprises acceptance of what is, in effect, a complete plea of guilty in violation of constitutional standards 12

(2) Petitioner was denied his constitutional rights to effective trial counsel and due process of law by the Trial Court placing him in the untenable position of requiring that he proceed with appointed counsel (who represented conflicting interests, did not wish to proceed, and stated that petitioner would "probably be better off with another attorney") or to "sit there by himself" and defend without counsel or, at best, proceed with a new appointed attorney who would have to go forward in "a half hour or so" 19

(3) Petitioner was denied his constitutional rights to effective trial counsel and due process of law by his appointed attorney's allowing him to proceed on a single plea of "not guilty by reason of insanity" when well established defenses on the merits were self-evident.. 25

(4) Petitioner was denied his constitutional rights to effective trial counsel and due process of law by his appointed counsel's failure to assign as misconduct, incurable by admonishment, the district attorney's continued elicitation of petitioner's juvenile record, misdemeanor record, and arrest record without conviction 33

Page

(5) Petitioner was denied procedural and substantive due process of law by the Trial Court's finding, without adversary hearing on that issue, that the crime charged was robbery in the first degree when that fact was not charged in the accusatory pleading, that fact was not at issue in petitioner's insanity trial, and there was no stipulation as to the degree of the offense 36

(6) Petitioner was denied substantive due process of law by the Trial Court's sentencing of petitioner to "consecutive sentences" for the sole reason that petitioner had asked for a trial albeit only on the issue of his sanity 38

Conclusion 41

Table of Authorities Cited

Cases	Pages
Anders v. California (1967), 386 U.S. 738, 18 L.Ed.2d 493	2
Boykin v. Alabama, 395 U.S. 238, 23 L.Ed.2d 274, 89 S. Ct. 1709	12, 14, 16, 17
Brubaker v. Dickson, 310 F.2d 30	30, 32
Euziere v. United States, Court of Appeal of Oklahoma, 1957, 249 F.2d 293	17
Gundlach v. United States, 262 F.2d 72 (4th Circuit 1958), cert. den. 360 U.S. 904 (1959)	17
In re Hawley, 67 C.2d 824	28
In re Stocker, 257 C.A.2d 613	24
In re Tahl, 1 C.3d 122	12, 16
In re Williams, 1 C.3d 168	28
Julian v. United States, 236 F.2d 155 (6th Circuit 1956)	17
Palko v. Connecticut (1937) 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288	40
People v. Ammerman, 118 C. 23	28
People v. Arriola, 164 C.A.2d 430	28
People v. Edgmon, 267 C.2d 759	32
People v. Flores, 269 C.A.2d 666	31
People v. Ford, 60 C.2d 772	28
People v. Garcia, 169 C.A.2d 368	28
People v. Gorshen, 51 C.2d 716	30
People v. Harris, 175 C.A.2d 678	37
People v. Haygood, 179 C.A.2d 112	2
People v. Henderson, 60 C.2d 482	39
People v. Houser, 238 C.A.2d 930	35
People v. Ibarra, 60 C.2d 460	28, 30, 32
People v. Kerr, 37 C.2d 11	37
People v. Kerfoot, 184 C.A.2d 622	20
People v. Kimball, 5 C.2d 608	35, 36
People v. Lookadoo, 66 C.2d 307	31
People v. McDowell, 69 C.2d 737	27, 31
People v. Perry, 242 C.A.2d 724	20, 23
People v. Reeves (1966), 64 C.2d 766	25
People v. Robinson, 222 C.A.2d 602	24

Pages

People v. Sturgess, 178 C.A.2d 435 36
People v. Tambini, 275 C.A.2d 757 31
People v. Thomas, 37 C.2d 74 37
People v. Vise, 21 C. 344 28
People v. Ward, 66 C.2d 571 37
People v. Wells, 33 C.2d 330 ..... 29, 30
People v. Williams, 2 C.3d 894 28
People v. Wolf, 61 C.2d 795 ..... 34, 35

United States v. Brown, 428 F.2d 1100 ..... 17, 18
United States v. Lester, Court of Appeal of New York, 1957, 247 F.2d 496 17
United States v. Morin, Court of Appeal Pennsylvania, 1959, 265 F.2d 241 17

Codes

Penal Code:
Section 26(5) 29
Section 211a 36, 37
Section 213 14
Section 1016 ..... 5, 7, 12, 14, 15, 16, 17, 38, 39

28 U.S.C.:
Section 1257(3) 4

Constitutions

United States Constitution:
Sixth Amendment 6
Fourteenth Amendment 6

Rules

Revised Rules of the Supreme Court of the United States:
Rule 22 4

Texts

8 American Law Review, p. 1219 34

Witkin, California Crimes, Sec. 300 ..... 31, 34

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PETITION FOR A WRIT OF CERTIORARI
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REFERENCE TO THE OPINIONS AND RULINGS OF THE COURTS BELOW.

Petitioner has been incarcerated over twelve years. He was charged with robbery in Shasta County, California in December of 1958 with two co-defendants. All were indigent and the same counsel was appointed to represent them. The other two defendants entered pleas of guilty. Petitioner entered the sole plea of not guilty by reason of insanity.

On January 21, 1959 petitioner was found to be sane and was given a sentence consecutive to one he was already serving in the state prison. He appealed and counsel was appointed to represent him upon appeal due to his indigency.

Appointed counsel filed a "no merit letter" in the form of a brief of only one-and one-half pages. That brief contains in its last paragraph this language: "There is some question that perhaps Appellant is not guilty of the crime charged."

On March 12, 1960 the California Third District Court of Appeal affirmed the conviction in *People v. Haygood,* 179 C.A.2d 112.

On July 2, 1970 petitioner filed a petition for a writ of habeas corpus representing himself.

On July 9, 1970 petitioner's present counsel was appointed for indigency reasons by the California Third District Court of Appeal. On that same date that Court ruled that the petition for a writ of habeas corpus was to be refiled as a motion to recall the remittitur. A copy of that ruling by acting Presiding Justice Friedman is attached hereto as Appendix I. On that same date the California Third District Court of Appeal ordered "briefing and oral argument of such arguments and contentions as petitioner would raise on appeal from the judgment." A copy of that order is attached hereto as Appendix II. The order was made in light of the rejection of this Court of "no merit" letter representation without more under the doctrine of *Anders v. California* (1967), 386 U.S. 738, 18 L.Ed.2d 493.

On February 26, 1971, after briefing and oral argument, the California Third District Court of Appeal filed its opinion denying the petition for a writ of habeas corpus treated as a motion to recall the remittitur and certified that its opinion was not to be published in the official reports. A copy of that opinion is attached hereto as Appendix III.

On March 23, 1971 the California Third District Court of Appeal denied petitioner's petition for rehearing. A copy of the denial is attached hereto as Appendix IV.

On April 29, 1971 the California Supreme Court denied a hearing from the ruling of the California Third District Court of Appeal. The California Supreme Court's denial was without opinion. A copy of the notice of denial sent to petitioner's appointed counsel is attached hereto as Appendix V.

On May 17, 1971 the Clerk of the California Supreme Court at the direction of the Court returned unfiled petitioner's petition for rehearing from the California Supreme Court's denial of a hearing. A copy of the Clerk's letter in that respect to petitioner's appointed counsel is attached hereto as Appendix VI.

Petitioner has exhausted his remedies in the courts of the State of California.

STATEMENT OF THE GROUNDS UPON WHICH JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED.

Jurisdiction of the United States Supreme Court is invoked under Rule 22 of the *Revised Rules of the Supreme Court of the United States* as the same appears in Title 28 of the *United States Code* providing for review by petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case when the same is filed with the Clerk of the United States Supreme Court within ninety days after the entry of such judgment.

The date of the judgment or decree sought to be reviewed is the California Supreme Court's April 29, 1971 denial of petitioner's petition for a hearing in that Court which was entered on said date.

The statutory provision believed to confer jurisdiction on the United States Supreme Court to review the judgment or decree in question by writ of certiorari is section 1257 (3) of Title 28 of the *United States Code* which provides, in pertinent part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . (3) By writ of certiorari, . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, . . . or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, . . . of the United States."

THE QUESTIONS PRESENTED FOR REVIEW

(1) Whether or not California *Penal Code* Section 1016 which provides that a defendant who pleads only "not guilty by reason of insanity" thereby admits the commission of the offense charged is unconstitutional in that it comprises acceptance of what is, in effect, a complete plea of guilty in violation of constitutional standards?

(2) Whether or not petitioner was denied his constitutional rights to effective trial counsel and due process of law by the trial court's placing him in the untenable position of requiring that he proceed with appointed counsel (who represented conflicting interests, did not wish to proceed, and stated that petitioner would "probably be better off with another attorney") or to "sit there by himself" and defend without counsel or, at best, proceed with a new appointed attorney who would have to go forward in "a half hour or so"?

(3) Whether or not petitioner was denied his constitutional rights to effective trial counsel and due process of law by his appointed attorney's allowing him to proceed on a single plea of "not guilty by reason of insanity" when well established defenses on the merits were self-evident?

(4) Whether or not petitioner was denied his constitutional rights to effective trial counsel and due process of law by his appointed counsel's failure to assign as misconduct, incurable by admonishment, the district attorney's continued elicitation of petitioner's juvenile record, misdemeanor record, and arrest record without conviction?

(5) Whether or not petitioner was denied procedural and substantive due process of law by the trial court's finding, without adversary hearing on that issue, that the crime was robbery in the first degree when that fact was not charged in the accusatory pleading, that fact was not at issue in petitioner's insanity trial, and there was no stipulation as to the degree of the offense?

(6) Whether or not petitioner was denied substantive due process of law by the trial court's sentencing of petitioner to "consecutive sentences" for the sole reason that petitioner had asked for a trial albeit only on the issue of his sanity?

THE CONSTITUTIONAL PROVISIONS OF THE UNITED STATES CONSTITUTION WHICH THE CASE INVOLVES.

(1) The Sixth Amendment to the United States Constitution which provides, in pertinent part:

"ARTICLE VI

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

(2) The Fourteenth Amendment to the United States Constitution which provides, in pertinent part:

"ARTICLE XIV

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

THE CALIFORNIA STATUTE WHICH THE CASE INVOLVES

California *Penal Code* section 1016 provides, in pertinent part with reference to a defendant who pleads only not guilty by reason of insanity:

> ". . . A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, *thereby admits the commission of the offense charged* . . ." (Emphasis supplied)

STATEMENT OF THE CASE

Petitioner was charged in the Shasta County Superior Court jointly with Frank Haygood and Edgar Bentley with the crime of robbery by information filed December 30, 1958. (CT: 3) All defendants were found indigent and the same private attorney was appointed "as public defender attorney" to represent them. (RT: 5) The other two defendants entered pleas of guilty. (RT: 4) Petitioner entered the sole plea of "not guilty by reason of insanity." (RT: 4) (California *Penal Code* section 1016)

On January 21, 1959, the jury found petitioner to have been sane at the time of the alleged offense. (CT: 4) Petitioner was declared ineligible for probation. (CT: 5) The court found the crime to be of the first degree and sentenced petitioner to the state prison for the term prescribed by law with his term to be consecutive with the sentence he was then serving in the California State Prison at San Quentin. (CT: 5)

Prior to the presentation of evidence at petitioner's sanity trial, he asked for a continuance. (RT: 5)

He also expressed a question as to whether or not his appointed defense counsel should continue as his attorney. (RT: 5, 6) The request for replacement of appointed defense counsel was made because petitioner expressed dissatisfaction and the assigned lawyer himself felt that he should not continue with the case. (RT: 7) Although petitioner indicated that he felt Mr. Pickering, his assigned attorney, had the ability to defend him and placed his desire for a continuance upon the basis that he wanted certain records which had not been subpoenaed (RT: 7), defense counsel thereafter made this statement to the court, indicating that he did not wish to go forward: "Your Honor, I don't myself feel under the circumstances that I could go forward because I don't feel like I have the confidence of the defendant, and I also feel that because of that that he possibly would be better off with another attorney." (RT: 7, 8)

Petitioner advised the trial judge that the expressed opinion of his assigned counsel quoted above did "make some difference" as well as the fact that the desired records were not present. (RT: 9)

The trial court denied any continuance. (RT: 12) In doing so, the court stated, ". . . if Mr. Pickering withdraws the defendant will be here without counsel." (RT: 12) The trial judge was of the opinion that although petitioner had a constitutional right to counsel that that right had been afforded to him by appointing a public defender and that if the court allowed the appointed attorney to withdraw for his expressed reason, that petitioner would have to proceed alone. (RT: 12)

In urging the petitioner to proceed with counsel who had expressed personal dissatisfaction with continuing, the judge indicated that he, the court, would protect petitioner's rights if Mr. Pickering were relieved. (RT: 12) The trial judge also expostulated at some length on the fairness of the District Attorney trying the case before advising assigned counsel and petitioner that petitioner would have to proceed in propria persona if his attorney withdrew or, at best, that a new attorney would be given in the neighborhood of a "half hour or so" to prepare the defense. (RT: 12, 13) In that respect the following pertinent language appears in the Reporter's Transcript at page 13: "If the defendant wants to keep you I think I ought to let you stay here. If he doesn't want you he will just have to sit there by himself, because I don't think the law justifies me in delaying this matter to try to get another public defender here who would have to acquaint himself with the case in a half hour or so." (RT: 13)

After this statement, the possibility of another attorney representing the petitioner with preparation, however cursory, was also withdrawn as the court informed petitioner and counsel categorically: "If the defendant is willing to have him remain I think I would ask him to do so. If he doesn't he will be relieved, but I am not going to appoint another one because I think the constitutional rights of the defendant have been preserved by appointing one public defender for him." (RT: 15)

Only at that point did assigned counsel agree to proceed. (RT: 16) No further inquiry was made as

to the wishes of petitioner in the matter nor as to the details of the expressed difficulty between appointed counsel and petitioner.

The records sought by petitioner indicated, inter alia, that he had been under the care of a psychiatrist at the United States Public Health Service Hospital. (RT: 7)

Petitioner was under the impression that the record would be present when the trial started. (RT: 7) Later on it developed, as the District Attorney pointed out, that assigned counsel had had some time to subpoena such records but did not do so. (RT: 93, 94)

The records sought also indicated confinement in the Public Service Hospital for narcotic problems. (RT: 7) There was an institutional psychiatric report on the petitioner finding him "legally sane." This proof came in by hearsay testimony, unobjected to on that ground or upon best evidence grounds, through State Department of Corrections Lieutenant John Francis McInerney of San Quentin Prison. (RT: 23) Petitioner had been subjected to narcotics addition since age 13 (RT: 13) and he had a history of prior psychiatric care. (RT: 78)

The psychiatrists called as witnesses on behalf of the court testified that petitioner had "disorder of personality" (RT: 50, 69), that he was a "sociopathic personality" (RT: 53, 63, 64, 69, 71), that he was "mentally disturbed" (RT: 54, 61), and that he was "abnormal." (RT: 61) Additionally, he was found to have "chronic anxiety" and "neurotic symptoms."

(RT: 44, 50, 70, 71) His former drug addiction was also noted as a part of his medical history during psychiatric interview. (RT: 50)

The record also indicates that petitioner had a history of memory lapse going back eight or nine years and on one occasion such mental black-outs lasted three to four days. (RT: 44) This history of unconsciousness was related during psychiatric interview. (RT: 45)

Various witnesses related petitioner's claimed confusion and unconsciousness. (RT: 30, 31, 33, 35, 45, 67, 73, 74) Petitioner himself so testified at the insanity trial. (RT: 76, 77, 81, 87)

The transcript also indicates the finding and drinking of wine after a long period of abstinence (RT: 25, 30, 35, 40), the drinking of liquor at the Empire Bar (RT: 26), and drinking from a half bottle of whiskey. (RT: 75)

Additionally, there were multiple statements that petitioner was "pretty drunk" (RT: 33, 36), that he had done "considerable drinking" so that he "did not remember too clearly" and did not ". . . even remember going to Rio Del." (RT: 30)

On cross-examination the District Attorney elicited the entire criminal background of petitioner from the time he was ten years old. He started with that very question: "Isn't it true that you have been in trouble with the law since you were ten years old?" (RT: 81)

Even though petitioner answered in the affirmative, the prosecutor detailed before the jury petitioner's

record as a "delinquent." (RT: 81, 82) He went into petitioner's arrest record whether or not convictions followed and whether or not felonies, misdemeanors or juvenile charges were involved. (RT: 81-86) After almost all of petitioner's criminal record was before the jury, his appointed counsel objected belatedly upon the ground that the questioning was proper only as to felonies. (RT: 85) The objection was overruled by implication. (RT: 85)

The jury was out 24 minutes. Petitioner was found to be sane at the time the offense occurred. (RT: 101)

ARGUMENT AND AUTHORITY

(1) CALIFORNIA PENAL CODE SECTION 1016 WHICH PROVIDES THAT A DEFENDANT WHO PLEADS ONLY "NOT GUILTY BY REASON OF INSANITY" THEREBY ADMITS THE COMMISSION OF THE OFFENSE CHARGED IS UNCONSTITUTIONAL IN THAT IT COMPRISES ACCEPTANCE OF WHAT IS, IN EFFECT, A COMPLETE PLEA OF GUILTY IN VIOLATION OF CONSTITUTIONAL STANDARDS.

California *Penal Code* Section 1016 provides, inter alia:

> ". . . A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged . . ."

Under the strictures of *Boykin v. Alabama,* 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709, and *In re Tahl,* 1 C.3d 122, even an affirmative plea of guilty by a defendant with counsel cannot be accepted without the record reflecting a meaningful waiver of con-

stitutional rights. In that respect, at least the following must be the subject of inquiry:

(1) An explanation of defendant's privilege against compulsory self-incrimination;

(2) An explanation of defendant's right to confront his accusers;

(3) An explanation of defendant's right to a trial by jury;

(4) An explanation of the possible penalties that could result from the entry of a guilty plea to any charge facing the defendant;

(5) An ascertainment as to whether any threat, inducement, or promise has been made to the defendant to get him to enter a plea of guilty;

(6) An inquiry by the court to determine whether or not the defendant understands the elements of the crime with which he is charged;

(7) An elicitation by the court of the underlying facts sufficient to indicate in the record that the charged offense was committed by the defendant as alleged:

(8) A questioning of the defendant to determine whether or not he understands each and all of his rights:

(9) An inquiry and determination by the court as to the defendant's intelligent, free, and voluntary waiver of all of his constitutional protections.

The record here is barren of any such inquiry. If such an inquiry is mandated when an affirmative plea

of guilty is accepted from a defendant whose sanity is in no way in question, then certainly that minimal inquiry should also be made before a defendant raising an insanity defense is deemed by operation of law to admit the commission of an offense carrying an indeterminate sentence of five years to life. (California *Penal Code* §213)

To hold that the invidious language of California *Penal Code* Section 1016 is constitutionally valid as applied to a man whose complete mental state is in issue but that a sane man making an affirmative plea of guilty requires far greater protection constitutionally before his plea may be entered is to hold that the law can do indirectly to a man pleading legal insanity that which it cannot do directly even to a man without such claimed infirmity. To so hold is to hold that the rubric of a state statute can effectively render nugatory the established requirement of the *United States Constitution* under the due process clause of the Fourteenth Amendment that any guilty plea must be intelligently, freely, and voluntarily made.

As this Court concluded in *Boykin* where a sane defendant entered pleas of guilty with counsel to five counts of armed robbery: "[I]t was error . . . for the trial judge to accept petitioner's plea without an affirmative showing that it was intelligent and voluntary." (395 U.S. at page 242 [23 L.Ed.2d at page 279].)

Certainly this Court's rationale in *Boykin* must apply with equal, if not greater cogency, to a defend-

ant, such as petitioner, whose mental illness is apparent on the record. This Court expressed that rationale in this manner:

> "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination. . . . [Citations.] Second, is the right to trial by jury. [Citation.] Third, is the right to confront one's accusers. [Citation.] We cannot presume a waiver of these three important federal rights from a silent record.
>
> "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought [citations], and forestalls the spin-off of collateral proceedings that seek to probe murky memories." (395 U.S. at pp. 243-244 [23 L.Ed.2d at p. 280].)

The record at bench is silent as to any waiver at all by petitioner except the waiver mandated by operation of law under California *Penal Code* section 1016. To hold such waiver sufficient from a constitutional standpoint is to hold that the law can constitutionally force an "operation of law" guilty plea from a defendant claiming legal insanity which would be grossly constitutionally deficient from the very mouth of a completely sane accused. To so hold is to hold that no waiver will be presumed from a

silent record of vital constitutional rights, unless there is a plea of not guilty by reason of insanity in which event the defendant, by statute, ". . . thereby admits the commission of the offense charged . . ." (California *Penal Code* section 1016). To so hold is to hold that the mantle of constitutional protection is a lesser garment for those asserting legal insanity, who by that assertion are deemed under the statute complained of to admit the offense charged, than it is for those who seek to make such admission by their own voice by stating in open court, "My plea is guilty." Surely there is no such double constitutional standard in the United States of America.

The Honorable California Third District Court of Appeal disposed of this contention ". . . on procedural grounds without considering the substantive merit of the contention." (DCA: 12) That court relied on the *Tahl* pronouncement of the California Supreme Court that *Boykin* was prospective only and "the plea" under consideration here was entered some ten years before the 1969 *Boykin* interpretation pointing out in citation that certiorari was denied by the United States Supreme Court in *Tahl* at 26 L.Ed. 2d 72. (DCA: 12) Petitioner respectfully contends that such disposition misses the thrust of petitioner's contention for the following reasons:

(1) Pre-*Boykin* federal law required voluntariness and full understanding before a guilty plea was valid.

Over a decade before the *Boykin* pronouncements, the requirements of voluntariness and full under-

standing by the accused with reference to his plea of guilty existed. Even in 1958 there were implications that that personal interrogation by the court as to the defendant's understanding of the charges and concerning the voluntariness of his plea was certainly the better practice (*Gundlach v. United States,* 262 F.2d 72 (4th Circuit 1958), certiorari denied at 360 U.S. 904 (1959); see also *Julian v. United States,* 236 F.2d 155 (6th Circuit 1956).

It was the law in 1957 that a plea of guilty had to be entered freely, voluntarily, and without a semblance of coercion or it was entered in violation of due process of law and any sentence imposed pursuant thereto could not stand. (*Euziere v. United States, Court of Appeal of Oklahoma,* 1957, 249 F.2d 293) The record at bench is barren of any showing of a free, voluntary and uncoerced plea on the part of petitioner for petitioner's plea was law-imposed under the mandate of California *Penal Code* section 1016.

Other Pre-*Boykin* cases continually holding a plea of guilty to be invalidly accepted without a showing of voluntariness and full awareness of the consequences are *United States v. Lester,* Court of Appeal of New York, 1957, 247 F.2d 496; *United States v. Morin,* Court of Appeal Pennsylvania, 1959, 265 F.2d 241.

The trial court was required to make direct inquiry of the petitioner defendant pleading not guilty by reason of insanity before allowing the defendant to admit that he did the acts charged by waiving a trial on all issues except insanity. *United States v. Brown,*

428 F.2d 1100. The case summary in the *Brown* reversal is directly in point here since California *Penal Code* section 1016, in effect, works such a prohibited stipulation without defendant's consent by operation of law:

> "Defendant was convicted in the United States District Court for the District of Columbia, Gesell, J., of forgery, uttering and interstate transportation of forged securities, and he appealed. On remand from the Court of Appeals, the District Court, 50 F.R.D. 110, held that it was not necessary for court to interrogate defendant personally before accepting stipulation of the facts on the merits, and defendant appealed. The Court of Appeals held that, though rule with respect to acceptance of guilty pleas was not applicable, it was reversible error for trial court to fail to address defendant personally before accepting defense counsel's stipulation that defendant, who was admittedly suffering from mental disorder, had commited the acts charged, waiving trial on all issues except insanity."

(2) PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE TRIAL COUNSEL AND DUE PROCESS OF LAW BY THE TRIAL COURT PLACING HIM IN THE UNTENABLE POSITION OF REQUIRING THAT HE PROCEED WITH APPOINTED COUNSEL (WHO REPRESENTED CONFLICTING INTERESTS, DID NOT WISH TO PROCEED, AND STATED THAT PETITIONER WOULD "PROBABLY BE BETTER OFF WITH ANOTHER ATTORNEY") OR TO "SIT THERE BY HIMSELF" AND DEFEND WITHOUT COUNSEL OR, AT BEST, PROCEED WITH A NEW APPOINTED ATTORNEY WHO WOULD HAVE TO GO FORWARD IN "A HALF HOUR OR SO."

Petitioner's trial counsel had an obvious conflict of interest. He also represented co-defendants Frank Haygood and Edgar Bentley. (RT: 5, CT: 9) Both co-defendants had entered pleas of guilty to the same robbery with which petitioner was charged. (CT: 8, RT: 4, 5) Such pleas were presumably entered only after their assigned attorney had discussed the facts and circumstances of the charges in detail with them. Obviously, if those co-defendants had implicated petitioner as being involved with them in the robbery as a look-out or get-away car driver, counsel could not adequately represent petitioner and properly advise him to plead "not guilty" on the merits as he should have done, since, at the trial, he would have had to attack the credibility of his clients Haygood and Bentley to establish that petitioner had no knowledge of the robbery going on as he waited in the car outside. Needless to say, petitioner's protestations of innocence to his attorney in that respect would have been viewed with at least a slightly jaundiced eye in view of the pleas of Haygood and Bentley if they

implicated petitioner as a principal in the robbery on an aiding and abetting theory.

Conversely, if Haygood and Bentley confidentially related to assigned attorney Pickering that petitioner was not involved in the robbery and had no knowledge of their felonious purpose and intent as he waited outside in the car, then assigned counsel was indeed grossly derelict in failing to enter appellant's "not guilty" plea on the merits and taking the case to trial.

As pointed out in *People v. Perry*, 242 C.A.2d 724, which was also a case in which defense counsel requested withdrawal and the court denied that request:

> "It must be that in many cases it becomes impossible for the lawyer to explain the conflict of interests because he cannot divulge the secrets of his client. (See *People v. Kerfoot*, supra, p. 644" *People v. Perry* 242 CA2d 724 at page 729 citing *People v. Kerfoot* 184 CA2d 622.

The *Perry* court also points out that when co-defendants are involved in a case of this kind that a lawyer's effectiveness in dual representation is often diminished and, for that reason, an attorney with undivided loyalty is required. Justice Devine, speaking for a unanimous court in reversing the judgment in *Perry* states at page 728:

> "Innumerable intangible factors exist in most cases of this kind which may diminish the lawyer's effectiveness by reason of the dual representation or even interfere with his obligation of undivided loyalty." (See *People v. Kerfoot* 184 CA2d 622, 637)

Since petitioner, as the trial judge noted, ". . . wasn't one of those that actually entered the place" (R.T. 10), the conflicting position of defense counsel was manifest. If his co-defendant clients implicated petitioner, defense counsel was precluded from impartially taking petitioner to trial on a "not guilty" plea and vigorously attacking the credibility of his own clients in arguing that petitioner had no knowledge of the robbery going on inside by the two co-defendants who pled guilty while he was their lawyer also. If petitioner's version of the incident was different in any way from that of the co-defendants, defense counsel was forced to select the particular client whose veracity he would accept when his duty was that of "undivided loyalty." Nor could defense counsel make a proper impartial choice if we assume that Petitioner related to him that he was in fact involved (which petitioner denies). In such instance, the status of the evidence would have indicated to an attorney without a conflict of interest that Petitioner should still go to trial on a "not guilty" plea, be kept off the witness stand, and every legitimate means of impeachment be used against the co-defendants to raise a reasonable doubt as to petitioner's guilt.

Since the co-defendants had already entered pleas of guilty and had been sentenced, (RT: 5) defense counsel by way of impeaching them, which was his duty to petitioner, would have had to raise the question of their felony convictions in this very case in which he himself represented them.

If, on the other hand, they testified favorably for petitioner, defense counsel would have had to argue the credibility of witnesses convicted of felonies while he represented them. Whichever position counsel took as to his co-defendant clients, the conflicting loyalties involved certainly mandated new counsel when the court was advised that counsel himself felt he should not continue with the case. (RT: 7)

The Honorable Third District Court Of Appeal opines that there were no such problems because, inter alia, "There were no defenses presented which could have been inconsistent." (DCA: 7) and ". . . since the two codefendants did not testify at petitioner's sanity trial there was no need or opportunity to attack their credibility." (DCA: 8) The very point petitioner here urges is that not only were there no "inconsistent" defenses presented on the merits but no defenses at all. None could have been presented with any effectiveness using co-defendants who had in fact pled guilty through the same attorney. Petitioner had asked his trial attorney to put the co-defendants on the stand to exonerate him of any knowing participation (HC: 6, 7) because he was "not aware that it had been committed by them, and was sick." (HC: 6) An argument ensued on the day of trial when counsel failed to call the co-defendants as witnesses and petitioner's belief that he was to be tried on the merits. (HC: 7)

In such a milieu the trial began. The defense attorney admitted that he did not have the confidence of the petitioner and asked to be relieved. He stated,

"Your Honor, I don't feel under the circumstances that I could go forward because I don't feel like I have the confidence of the defendant, and I also feel that because of that he possibly would be better off with another attorney." (RT: 7, 8) Upon the expression of that opinion by Mr. Pickering, petitioner concurred that: "Under the circumstances, the way it stands right now, Your Honor, he has expressed his opinion on the matter, so that does make some difference, and these records are not here and I would like to have them." (RT: 9)

Neither petitioner nor his assigned counsel articulated the specific reasons for petitioner's "lack of confidence" or the motivating factors behind counsel's request to withdraw. There is no such burden upon petitioner to do so as to the manner of conflict under the language of *Perry:*

> ". . . appellant does not have the burden of showing the manner in which a conflict of interest may have lessened the effectiveness of his counsel. . . ." (*People v. Perry* 242 CA2d 724, 729)

It is true that an expressed "lack of confidence" and a request to withdraw do not state a conflict of interest of necessity but in the context of this factual setting were certainly indicative of such. The court at the trial stage should have explored the obviously indicated conflict of interest when presented with defense counsel's request to withdraw and petitioner's concurrence in that request and the differences between them. Instead, the court denied any request for a continuance (RT: 11), told petitioner that if his

attorney withdrew he would "just have to sit there by himself." (RT: 13) The court further advised petitioner that any other attorney would have to go forward in a "half hour or so." (RT: 13)

After so advising petitioner that he could either proceed with the same appointed counsel or with an attorney who would have no reasonable time to prepare the case at all, the court further changed its mind and told petitioner that if he did not want his present attorney to proceed that he would be relieved but there would be no other attorney appointed to represent him because he was entitled to "one public defender" and the appointment of Mr. Pickering had preserved his constitutional rights. (RT: 15) The indicated remarks of the trial court fall far short of the requisites mandated to the trial court before a relief of counsel is granted by acceptance of a knowing waiver and a defendant is allowed to proceed in propria persona. (*In re Stocker* 257 C.A.2d 613)

Here, there was what amounted to court coercion to proceed at once with counsel who asked to withdraw and indicated that the accused would "be better off" with another attorney, or to proceed with another attorney "in a half hour or so" or to "sit there" by himself with no preparation time at all. Petitioner urges that it is the law that just as the court must allow a reasonable time for the defendant to obtain counsel of his own selection (*People v. Robinson,* 222 C.A.2d 602), so also the court may not go ahead just because the prosecution witnesses are there after telling the defendant that he may excuse his counsel

but will have to proceed alone without inquiry, ramification, or explanation.

Certainly here, the trial court had a duty to inquire why the defense attorney stated to the court on the date of trial that petitioner had no confidence in him and further his reason for stating that petitioner might be better off with another attorney. (RT: 7, 8) The court did not do so, depriving petitioner of his constitutional right to an attorney who was an effective and independent advocate in petitioner's cause.

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(3) PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE TRIAL COUNSEL AND DUE PROCESS OF LAW BY HIS APPOINTED ATTORNEY'S ALLOWING HIM TO PROCEED ON A SINGLE PLEA OF "NOT GUILTY BY REASON OF INSANITY" WHEN WELL ESTABLISHED DEFENSES ON THE MERITS WERE SELF-EVIDENT.

The California Third District Court of Appeal has cited *People v. Reeves* (1966), 64 C.2d 766, for the unquestioned proposition that "A defendant has the burden of establishing the allegation of inadequate representation not as a matter of speculation but as a demonstrable reality." (DCA: 9) The Court immediately thereafter concludes: "Such is not the case here." (DCA: 9.)

The Opinion reasons to support the latter assertion that, "There was no faulty judgment on the part of the defendant's attorney" because the record shows that "defendant himself stated that he didn't deny anything, including taking part in the robbery." (DCA: 9, 10) Petitioner contends that such assertion

is tantamount to saying that because an insane defendant tells his attorney that he is sane that the attorney is then relieved of the responsibility of raising an insanity defense even though it is blatantly palpable.

Here, the record also reflects that petitioner stated he had no recall of the alleged robbery. (RT: 76) The multiple evidence of hard liquor consumption is set forth on page 11 of this Petition. The manifold evidence in the record demonstrating a classic defense to the specific intent required for robbery vitiating his responsibility for that offense on mental state grounds other than from consumption of liquor are set forth at pages 10 and 11 of this Petition. Petitioner on every version of the facts was outside the premises robbed at the time of the offense and took no part in the force used. (DCA: 3) That undisputed fact further mandated a trial on the merits raising the obvious defense of no abetting with knowledge as well as no specific criminal intent due to diminishment of capacity.

Petitioner at all times wanted a defense on the merits. (Petition For Writ Of Habeas Corpus at pages 6-8) Tragically, with his eighth grade education (HC: 2), he thought he had actually been convicted on some kind of trial on the merits when he filed his in propia persona request to appeal his case. This is borne out by the language of that request appearing at page 7 of the Clerk's Transcript:

> "*I was convicted of Robb 1st in your court* and sentenced to the Department of Corrections on

25th January, 1959. I wish to appeal my case." (CT: 7, emphasis supplied)

The opinion of the Honorable Third District Court of Appeal points to no possible strategic theory which the defense attorney might have had in ignoring the self-evident defenses raised by the facts and trying the case only on the single plea of "not guilty by reason of insanity." No such strategic theory that could have worked to petitioner's advantages exists.

This case falls squarely within the rationale of this Court in *People v. McDowell,* 69 C.2d 737, where trial counsel possessed evidence, as here, of mental abnormality that would have been relevant to a defense of diminished capacity on the issue of guilt, but which he brought out only during the sanity phase of the trial. This Court reversed in *McDowell* holding the lack of such defense on the merits constituted a crucial denial of adequate representation of the accused.

In the case at bench, the loss was even more catastrophic for the defendant. Counsel's inadequacy in *McDowell* resulted in a reversal because the loss of the same critical defense resulted in a trial in which only one side of the case was heard. (*People v. McDowell,* 69 C.2d 737, 751) In the instant case there was no trial at all and petitioner's assigned attorney ". . . imprudently failed to give his client a fighting chance" toward an acquittal by allowing but a single plea of "not guilty by reason of insanity" when the evidence adduced at the trial on that issue, as offered by him and other witnesses, would have, if believed,

exonerated petitioner on the merits of culpability for the specific intent crime with which he was charged.

The insanity trial transcript alone bristles with facts indicating presentation of the defenses mentioned. If defense counsel interviewed petitioner, either co-defendant, or any of the witnesses who appeared at the insanity trial prior to that trial, his failure to see that defendant plead "not guilty" and had a trial on the merits of his multiple defenses is inexplicable. This Court has found such failure inexcusable and of Constitutional dimensions when such an obvious duty arises from the facts. (*People v. Williams,* 2 C.3d 894; *In re Williams,* 1 C.3d 168; *In re Hawley,* 67 C.2d 824; *People v. Ibarra,* 60 C.2d 460)

It has long been held that the crime of robbery requires a specific criminal intent. (*People v. Vise,* 21 C. 344, 345; *People v. Ammerman,* 118 C. 23) The court must even so instruct the jury on its own motion. (*People v. Ford,* 60 C.2d 772) Likewise, it has long been established that intoxication will vitiate specific intent and serve as a complete defense. (*People v. Arriola,* 164 C.A.2d 430; *People v. Garcia,* 169 C.A.2d 368)

"Any abnormal mental or physical condition, however caused, . . ." (CALJIC 3.35 in pertinent part) preventing the specific mens rea required or causing a reasonable doubt with reference thereto is a defense. Nor was the doctrine new or novel at the time petitioner was tried on December 23, 1958. (CT: 3) Almost ten years earlier this Court enunciated and

clarified the responsibility diminishment flowing from mental states tending to show that a specific criminal frame of mind with reference to the charged offense was lacking or doubtful. In *People v. Wells* (In Bank. January 25, 1949) 33 C.2d 330 this Court held such doctrine to be basic in stating:

> ". . . it is fundamental that at the trial upon a not guilty plea evidence, competent in character, which tends to show that a defendant, at the time he committed the overt act, either possessed or did not possess the specific essential mental state (as of malice aforethought, deliberate intent, etc.) is admissible." (*People v. Wells,* 33 C.2d 330, 347)

Overlaying petitioner's consumption of liquor and mental state in the record was the additional factor of past narcotics problems also militating toward the right to petitioner's requested day in court on the merits of his defenses. (RT: 7, 13, 77, 78)

It may be fairly said that the trial Judge himself recognized in petitioner an obvious mental problem for he stated at the time of judgment that petitioner was ". . . in need of psychiatric treatment . . ." and recommended that he be kept at Vacaville for that treatment. (RT: 105)

The insanity trial transcript also contains evidence of the complete defense of "unconsciousness" which should have been advanced by defense counsel upon a "not guilty" plea. (*Penal Code* §26, subsection five). There was a history of memory lapse going back eight or nine years and on one occasion the blackouts lasted

three or four days. (RT: 44) This history was related in psychiatric interview. (RT: 45) Multiple witnesses testified to petitioner's claimed confusion and unconsciousness as did the petitioner himself. (RT: 30, 31, 33, 35, 45, 67, 73, 74, 76, 77, 81, 87)

It is reversible error for the trial court to fail to instruct on the defense of unconsciousness even if that defense is based on the defendant's testimony alone. (*People v. Newton,* 8 C.A.3d 359, modified at 8 C.A.3d 401a)

Petitioner concedes that it is the law that an extreme case of lack of effective counsel at the trial court level must be shown. This record makes that showing. Within the meaning of *People v. Ibarra,* 60 C.2d 460 the record demonstrates that either defense counsel did not know or knew and did not take the trouble in an assigned case to raise the well-established defenses of unconsciousness, intoxication and diminished capacity to vitiate specific intent nor yet the factual defense that petitioner had no knowledge that a robbery was taking place since he did not enter the premises and thus was without the requisite mens rea. (RT: 10, 11, 59)

A defendant, indigent or wealthy, recidivist or upon an initial arrest, has a right to have his attorney prepare a defense based upon diminished responsibility under the *Wells-Gorshen* line of cases if the facts support it. (*People v. Wells,* 33 C.2d 330; *People v. Gorshen,* 51 C.2d 716 and *Brubaker v. Dickson,* 310 F.2d 30) Counsel's duty is to raise diminished capacity at a trial on the merits and not to leave it for

the sanity phase. (*People v. McDowell,* 69 C.2d 737; *People v. Lookadoo,* 66 C.2d 307; *California Crimes* by Witkin, §300)

Although the full details concerning the facts and circumstances of petitioner's involvement in the alleged robbery do not emerge clearly from the record, it is apparent that his contention that he did not enter the establishment was a fact since the trial judge stated: "This defendant, I understand, wasn't one of those that actually entered the place, but was involved in it and so admitted it." (RT: 10, 11) There was no objection by the District Attorney of that statement by the trial court. The District Attorney himself framed that fact in a question to Doctor Lieberman, ". . .The fact that Haygood and Bentley went in with the shotgun and Craig driving the car . . ." (RT 59)

Absent a showing that petitioner actually participated in the taking of the $207.50 from the victim Jess Morgan in the establishment and absent proof that petitioner himself actually exerted the alleged force upon the victim and participated in putting him in fear (CT: 3), it is journeyman lawyer logic that petitioner's chances of an acquittal greatly exceeded those of his co-defendants. For, although he may have aided by assisting the co-defendants, he did not "abet" them if he had no knowledge of their wrongful purpose and was thus not guilty of the offense charged. (See *People v. Tambini,* 275 C.A.2d 757, 765; *People v. Flores,* 269 C.A.2d 666, 669)

The factual defense of lack of participation and/or knowledge should have been raised on the merits.

Failure to insist that petitioner be tried upon a plea of "not guilty" raising that defense and the other defenses indicated manifestly demonstrates a lack of effective counsel at the trial level. Failure to do so not only resulted ". . . in withdrawing a crucial defense from the case" (*People v. Ibarra,* 60 C.2d 460, 464) but resulted in a complete failure to raise any defense at all when even a cursory investigation of the facts indicates cogent classic and developmental defenses which should have been presented upon a plea of "not guilty" and argued with the zeal of earnest advocacy.

It has been suggested in *Brubaker v. Dickson,* 310 F.2d 30 ". . . that to be reversible the record must show inadequate representation by defense counsel precluding the presentation of defenses available to a defendant which has . . . rendered his trial fundamentally unfair . . ." (As cited by Presiding Justice Pierce of the Third District Court of Appeal in *People v. Edgmon,* 267 C.2d 759, 768) In the case at bar petitioner was precluded from every single defense available to him by his atttorney's failure to present to a trial jury on a "not guilty" plea his mental state as it related to the specific intent element of the crime of robbery.

It is also pointed out that petitioner's assigned counsel had ample time to subpoena the records and foundational proof urged by petitioner as being relevant to his mental state so that petitioner's lay contention in that respect could at least be examined at the time of trial. He did not do so. (RT: 7, 93, 94)

Even before the trial on insanity began and without knowing what witnesses would be called by the District Attorney, it was apparent that petitioner's lawyer had arranged for no witnesses covering the area of petitioner's conduct and the spectrum of his mental state before the alleged crime, during the alleged crime, or while incarcerated awaiting trial. When asked by the court whether or not he had any witnesses when a continuance was being discussed he stated: "We have no witnesses except the defendant himself, Your Honor." (RT 11)

Assigned defense counsel's lack of familiarity with the criminal law and the well-known colloquial terminology surrounding it, is amply demonstrated by his having to ask what the term "vag" was as the District Attorney brought out that misdemeanor offense improperly before the jury. (RT: 83)

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(4) PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE TRIAL COUNSEL AND DUE PROCESS OF LAW BY HIS APPOINTED COUNSEL'S FAILURE TO ASSIGN AS MISCONDUCT, INCURABLE BY ADMONISHMENT, THE DISTRICT ATTORNEY'S CONTINUED ELICITATION OF PETITIONER'S JUVENILE RECORD, MISDEMEANOR RECORD, AND ARREST RECORD WITHOUT CONVICTION.

The prosecutor went back to the time that petitioner was ten years old to show his "trouble with the law." (RT: 81) His juvenile record was detailed. (RT: 81, 82) He was called a "delinquent" by the District Attorney. (RT: 81, 82) Mere arrests, whether for felony, misdemeanor, or as a juvenile were inquired into. (RT: 81-86)

After most of the damage had been done, there was an objection that the questions should be limited only to felonies. (RT: 85) The court overruled the objection by implication misstating the law. (RT: 85) In that respect the court advised the jury concerning petitioner's entire elicited past conduct:

> "Well, on an insanity trial it may be considered by the jury to whatever extent they think it affects the issue of insanity. In other words, we are not trying the man for the things he has done in the past, but the jury can take the record into consideration in connection with the other testimony on the sole issue which we have before us here." (RT: 85)

The court reiterated its erroneous impression as to the admissibility of the behavior of petitioner on other occasions in ruling on a prosecution objection upon the grounds of relevancy stating in the presence of the jury:

> "I can't say that it is entirely irrelevant because on an insanity examination *anything* that goes to the behavior of the person is relevant." (RT: 93) (emphasis supplied)

The above instructions as to the law conflict with the established rule that a defendant's conduct before and after an offense "within a reasonable time" is admissible to show his mental condition at the time. (*People v. Wolf,* 61 C.2d 795, 8 *ALR* 1219, §300 of *California Crimes* by B. E. Witkin) Going back to Petitioner's juvenile record and in fact to the time he was ten years old cannot be considered a "reasonable time."

At the conclusion of the evidence the jury was told under CALJIC 801 that it could ". . . consider evidence of his mental state before and after that time . . .". i.e., the time of the offense without limiting the evidence in any way to the "reasonable time" before and after the offense as required by *Wolf*.

In disposing of this contention by petitioner, the Honorable Third District Court of Appeal cites *People v. Houser,* 238 C.A.2d 930, for the proposition that: "The rules foreclosing admission of certain evidence of past conduct in a criminal action being tried on a plea of not guilty to the offense charged are not applicable to a plea of not guilty by reason of insanity, because the commission of the offense itself is admitted." (DCA: 11) Petitioner does not so read the *Houser* decision. There the court admitted evidence of past miscreant history of the defendant as related by a doctor to form, in part, the basis of his opinion as to sanity, the very issue in the trial. Here the prosecutor elicited the information complained of on cross-examination for no such relevant purpose of expert opinion on sanity but rather for its prejudicial effect against the petitioner himself before the jury.

Further, petitioner contends that *Houser* being a decision of an intermediate appellate court does not change the law pronounced by this Court in setting forth the "reasonable time" limitation on prior and subsequent acts in *Wolf* and also in the older case of *People v. Kimball,* 5 C.2d 608. *Kimball* involved a factual situation as in *Houser* where the defendant

went to trial ". . . solely on the sanity issue." (*People v. Kimball,* 5 C.2d 608, 609) The Court there stated that the test was relevancy and what was a "reasonable time" and "relevancy" rested largely in the discretion of the trial court and found no abuse of that discretion in allowing evidence to prove defendant's connection with the corpus delecti of the offense involved.

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(5) PETITIONER WAS DENIED PROCEDURAL AND SUBSTANTIVE DUE PROCESS OF LAW BY THE TRIAL COURT'S FINDING, WITHOUT ADVERSARY HEARING ON THAT ISSUE, THAT THE CRIME CHARGED WAS ROBBERY IN THE FIRST DEGREE WHEN THAT FACT WAS NOT CHARGED IN THE ACCUSATORY PLEADING, THAT FACT WAS NOT AT ISSUE IN PETITIONER'S INSANITY TRIAL, AND THERE WAS NO STIPULATION AS TO THE DEGREE OF THE OFFENSE.

The information charged only a taking by means of force and fear from the victim. It did not charge the use of a dangerous or deadly weapon or torture to make the crime robbery in the first degree under California *Penal Code* Section 211a. (CT: 3)

The record is barren of any stipulation that the robbery was in the first degree.

Only petitioner's sanity under the McNaughten rule as defined in California was in issue. (*People v. Sturgess,* 178 C.A.2d 435)

Due process of law requires a hearing to determine the degree of the offense and the punishment to be imposed. While such a hearing is not a ". . . trial in

the full technical sense, and is not governed by the same strict rules of procedure as a trial." *People v. Thomas,* 37 C.2d 74, 76-77), still the trier of the fact must take evidence. (*People v. Harris,* 175 C.A.2d 678, 679) At such a hearing the defendant is entitled to the same basic constitutional guarantees and the prosecution is held to the same burden of proof as in the case in which the defendant pleads not guilty. (*People v. Kerr,* 37 C.2d 11, 15)

No such hearing was held as to petitioner to whom the difference meant and means years of incarceration. Since petitioner would be entitled to appeal on the result of a hearing on the degree of his offense where such a hearing was in fact held even though no certificate of probable cause was filed by the trial judge, he is certainly entitled to raise the point where no hearing at all has been held. (*People v. Ward,* 66 C.2d 571) Here the finding of the trial judge without hearing dealing with that issue meant "not less than five years" to petitioner as against "not less than one year." (California *Penal Code,* Section 211a)

To hold that the trial court can abstract limited evidence at a sanity trial concerning use of a weapon by two co-defendants who do not testify and where that fact is an irrelevancy to the issue of sanity satisfies the evidence requirement of "evidence" of first degree robbery to the quantum required without petitioner's testimony on the issue or cross-examination on that issue adds four years minimally to petitioner's incarceration without a semblance of due process of law.

To say, as does the Honorable Third District Court of Appeal, that petitioner's argument ". . . might have some merit if he had pleaded not guilty ' the overt act of the robbery itself, but he pled guilty under section 1016 of the California *Penal Code*." is to say, as petitioner contends, that petitioner lost his right to a hearing on degree and a hearing on a meaningful plea of guilty with intelligent waiver of rights by the grossly discriminatory language of that section which, in effect, says to an accused, that if he adheres only to an insanity defense he comes to court with fewer constitutional rights by way of plea procedures and degree of crime procedures than he does upon an overt guilty plea or an overt denial of the degree of the crime charged by trial on the merits after a not guilty plea. Petitioner urges that constitutional protections are protections at all stages of the criminal process and may not be eroded and deprived by statute simply because a plea of "not guilty by reason of insanity", and that plea alone, is entered by an accused.

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(6) PETITIONER WAS DENIED SUBSTANTIVE DUE PROCESS OF LAW BY THE TRIAL COURT'S SENTENCING OF PETITIONER TO "CONSECUTIVE SENTENCES" FOR THE SOLE REASON THAT PETITIONER HAD ASKED FOR A TRIAL ALBEIT ONLY ON THE ISSUE OF HIS SANITY.

The sentencing transcript reflects that the trial judge did not even consider the petitioner for concurrent sentences simply because he had failed to enter a plea of guilty. The court makes its position

in that respect quite plain by ordering consecutive sentences for petitioner and categorically stating the reason therefor in the following language:

> "I am making that consecutive because I always reserve the concurrent sentences for those who plead guilty. I feel that is something they are entitled to." (RT: 105)

Just as a defendant cannot constitutionally be required to forego an appeal in a murder case where he has been meted out a life sentence by risking the death penalty upon a retrial if he is successful in obtaining a reversal (*People v. Henderson,* 60 C.2d 482), so here petitioner may not be penalized sentencewise because he asked for a jury trial on any issue in the case. His constitutional right to a jury trial may not be fettered by the knowledge that if he loses and is sentenced he will face concurrent sentences but if he expedites his loss by a guilty plea that he will be entitled to the automatic benevolence of concurrent sentences.

Paradoxically, petitioner was unconstitutionally deemed to have entered a plea of guilty under the language of *Penal Code* Section 1016 as a defendant asserting legal insanity as a defense but was evidently found by the trial judge not to be among those who were "entitled to" concurrent sentences because they had pled guilty. The statement of the court indicates a completely improper criterion for determining when a sentence is to be "consecutive" by turning the decision upon the exercise of a constitutional right to trial.

The Honorable Third District Court of Appeal declined to rule upon this point of petitioner finding that the question had become moot. (DCA: 14) The court reasoned that an Exhibit showed petitioner's discharge from his California sentences took place on December 13, 1970. (DCA: 14) However, petitioner urges that the problem is not moot for him in the practical sense that the expression of the trial judge in this case on the record tat he should have "consecutive" sentences may well influence his sentence with the Nevada authorities since, as a matter of common knowledge, sentencing authorities consider a trial judge's view that a convicted defendant merits a harsh "consecutive" sentence treatment as some evidence of the necessity of long incarceration. Here that expression and finding was based on the trial judge's personal caprice that only those who "plead guilty" should be entitled to concurrent sentences and the consecutive sentence finding should be stricken from the record as prejudicially erroneous so that it will in no way bear upon the length of petitioner's present term in the State of Nevada.

Certainly it is a basic right of a free society not to be subject to a judge who blatantly states from the bench upon sentencing that he reserves concurrent sentences ". . . for those who plead guilty . . ." The ". . . very essence of a scheme of a scheme of ordered liberty . . ." demands more. (*Palko v. Connecticut* (1937) 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288)

CONCLUSION

Wherefore petitioner prays this his Petition For A Writ Of Certiorari be granted and that this Court reverse the judgment of the trial court for deprivation of petitioner's constitutional rights as herein set forth.

Dated Woodland, California,
June 22, 1971.

Respectfully submitted,
HARRY A. ACKLEY,
Attorney for Petitioner.

(Appendices Follow)

Appendix I

In the Court of Appeal
State of California
Third Appellate District

3 Crim. 5877

In re
Robbie O. Craig
on Habeas Corpus

By the Court:

Good cause appearing, it is ordered that the petition for writ of habeas corpus filed herein be refiled under the case of People v. Haygood; R. O. Craig, 3 Crim. 2971, as a motion to recall the remittitur.

Dated: July 9, 1970

Friedman, Acting P. J.

cc-Attorney General
Robbie O. Craig
P. O. Box 607
Carson City, Nevada

Filed July 9, 1970,
Wilfried J. Kramer, Clerk.

Appendix II

In the Court of Appeal
State of California
Third Appellate District

3 Crim. 2971

People of the State of California

vs.

Haygood; R. O. Craig

By the Court:

Having considered petitioner's motion to recall the remittitur and reinstate the appeal, the court has determined to withhold its decision on the motion to recall remittitur pending further briefing and oral argument of such arguments and contentions as petitioner would raise on appeal from the judgment.

It is further ordered that Mr. Harry A. Ackley, Attorney at Law, who has consented to serve be and he is hereby appointed to represent appellant in this matter. Time to file the appellant's opening brief is extended until August 10, 1970. Respondent's brief is to be filed within 30 days after filing of appellant's opening brief.

Dated: July 9, 1970

Friedman, Acting P. J.

cc-Attorney General
Robbie O. Craig
P. O. Box 607
Carson City, Nevada
Harry A. Ackley, Attorney at Law
P. O. Box 1515, Woodland, Calif.

Appendix III

In the Court of Appeal
State of California
Third Appellate District
(Shasta)

3 Crim. 2971

The People of the State of California,
Plaintiff and Respondent,
vs.
Frank Haygood, et al.,
Defendants,
R. O. Craig,
Defendant and Appellant.

Opinion

Defendant and two other men (Haygood and Bentley) were charged by information with robbery in 1958. All were indigent and one attorney, Mr. Pickering, was appointed and represented all three. Haygood and Bentley pleaded guilty. Defendant entered a plea of not guilty by reason of insanity only.

The jury found defendant to have been sane at the time of the offense. The trial court found the crime to be of the first degree. Defendant was sentenced to state prison for the term prescribed by law to be served consecutively with the sentence he was then serving.

Defendant timely appealed to this court and counsel on appeal was appointed. Appointed counsel filed a "no merit" letter and the judgment was affirmed in People v. Haygood, 179 Cal.App.2d 112, on March 12, 1960.

The case is now before this court for the second time, based on defendant's petition of July 2, 1970, for habeas corpus, treated as a motion to recall the remittitur upon which this court appointed counsel and ordered "briefing and oral argument of such arguments and contentions as petitioner would raise on appeal from the judgment," and decision on the motion to recall the remittitur has been withheld pending such briefing and argument. (See Orders of July 9, 1970; People v. Wells (1968) 261 Cal.App.2d 468; Anders v. California (1967) 386 U.S. 738, 18 L.Ed.2d 493.)

Defendant makes the following contentions on appeal:

(1) Defendant was denied due process of law because of failure to afford him effective legal representation.

(2) Penal Code section 1016, which provides that a defendant who pleads not guilty only by reason of insanity thereby admits the commission of the offense charged, is unconstitutional in that it comprises acceptance of what is, in effect, a complete plea of guilty in violation of constitutional standards.

(3) The court's finding that the crime was robbery in the first degree when that degree was not charged in the accusatory pleading, that fact was not an issue at the insanity trial, and there was no stipulation as

to the degree of the offense, constitute prejudicial error.

(4) The court's sentencing of defendant to "consecutive sentences" for the sole reason that defendant had asked for a trial constituted a gross abuse of discretion.

Due to defendant's plea the evidence introduced was as to the issue of insanity and not to the issue of guilt as to the robbery itself. The evidence was primarily petitioner's own testimony, his statements made to arresting officers and others, and testimony of psychiatrists who examined him.

At the time of the crime defendant was an inmate in custody of the Department of Corrections at High Rock Conservation Camp in Weott. He and his fellow inmates, Haygood and Bentley, drank some liquor and then left the camp.

They went to the town of Ric Dell and planned to try to get to Mexico. They "hot-wired" a car in Rio Dell which contained a shotgun and headed for Redding in the car. Upon arriving in Redding, they drove around for most of the day and then early in the evening went to the Empire Bar where they had a few drinks. Since they were short of money, they went outside and looked the place over. Around midnight, by mutual agreement among the three, defendant's partners went in with the shotgun and conducted the holdup. Defendant stayed in the car and was driving when they left.

After the holdup they decided to go to Chico, but were stopped by the highway patrol and escaped on foot, then later were captured in Red Bluff. Defend-

ant felt there was something mentally wrong with him as he couldn't understand why he left camp when he only had a short time left to serve.

The testimony of the two doctors appointed by the court established that in their opinion defendant was mentally disturbed and had a sociopathic personality but that he knew the difference between right and wrong and the nature and quality of his acts. He was, therefore, legally sane in their opinion. Included in the testimony was a statement that defendant made in one doctor's interview to the effect that he had a drink of whiskey and following that he couldn't remember much until he was in the brush alongside the Sacramento River about three days later.

Defendant testified concerning some blackout spells which began about nine years previously while he was in the Texas Penitentiary. He also admitted spending time in the United States Public Health Hospital in Fort Worth for narcotic addiction. He also related that he was involved in group therapy while in prison.

On cross-examination he stated that he didn't deny the robbery, escape or car theft. All he wanted to do was tell them that he was asking for and needed help.

Prior to the presentation of evidence at his sanity trial he asked for a continuance, expressing a question as to whether or not appointed counsel should continue as his attorney. Although defendant indicated he felt counsel had the ability to defend him, he placed his desire for a continuance primarily on the basis he wanted certain records which had not been subpoenaed. Counsel stated to the court that he

felt he did not have the confidence of the defendant and that defendant possibly would be better off with another attorney.

In denying a continuance, the court informed defendant and counsel: "If the defendant is willing to have him remain I think I would ask him to do so. If he doesn't he will be relieved, but I am not going to appoint another one because I think the constitutional rights of the defendant have been preserved by appointing one public defender for him." At this point assigned counsel agreed to proceed without further objection.

There was an institutional psychiatric report on the defendant finding him "legally sane." This proof of prior psychiatric care came in by testimony through State Department of Corrections Lieutenant McInerney of San Quentin Prison.

On cross-examination the district attorney elicited the entire criminal background of the defendant by asking him the question: "Isn't it true that you have been in trouble with the law since you were ten years old?" Answer: "Yes."

The prosecutor detailed before the jury the defendant's juvenile record as a delinquent. He went into defendant's adult arrest record without distinguishing whether or not convictions followed and whether or not felonies or misdemeanors were involved. After almost all of defendant's criminal record was before the jury, his counsel objected upon the ground that the questioning was proper only as to felonies. The objection was overruled on the ground that at an